UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 17

STAHL SPECIALTY COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL #1464 affiliated with the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Case No. 17-CA-088639

RESPONDENT STAHL SPECIALTY COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Administrative Law Judge's ("ALJ") decision in this matter remains fatally flawed by mischaracterization of testimony, lack of record evidence, impermissible speculation, and unfounded credibility determinations. Specifically, the ALJ erred in finding that: Respondent Stahl Specialty Company ("Stahl" or "Respondent") knew of former Production Operator Patrick "Chris" Armstrong's ("Armstrong") alleged protected activity, Respondent's investigation into Armstrong's claims insubordination was inadequate, and Respondent discharged Armstrong because of discriminatory union animus. Most egregiously, and indicative of the illusory and sham nature of the purported remand, review and reaffirmation proceeding as a whole, despite finding that the General Counsel had failed to carry its burden with regard to Respondent's alleged threat not to hire an employee's relative, the ALJ nevertheless inexplicably concluded, and reaffirmed her conclusion, that Respondent violated the law on this issue and included it in her recommended order. The ALJ further erred in finding that Respondent engaged in surveillance of handbilling, threatened plant closure, interrogated an employee about his protected activities, and posted literature threatening job loss, all of which findings are unsupported by the preponderance of all record evidence. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). Additionally, consistent with Respondent's previous objections in this matter, the complaint and proceedings in this matter are void because (1) Acting General Counsel Lafe Solomon lacked authority by virtue of the circumstances of his appointment and provisions of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.*, as explained in detail in *SW General, Inc. v. N.L.R.B.*, 796 F.3d 67 (D.C. Cir. 2015); (2) because the ALJ was appointed by an unconstitutionally-comprised National Labor Relations Board as explained in *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2578, 189 L. Ed. 2d 538 (2014); and (3) because the purported remand and associated review and

reaffirmation proceedings herein have been nothing more than a sham, as demonstrated by the ALJ's failure to remedy the inexplicable internal inconsistency and error described in Respondent's Exception 127 which shows how the ALJ contradicted herself by finding as a fact that the General Counsel introduced no evidence to support an allegation in the complaint but nonetheless concluded that the Respondent committed the alleged violation despite there being no evidence to support the allegation. Accordingly, the ALJ's Decision and Recommended Order should be rejected, the Order Ratifying and Adopting Decision of Administrative Law Judge Christine E. Dibble dated April 22, 2016 also should be rejected, and the General Counsel's Complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS

A. Respondent Stahl Specialty Company

1. Organization

Respondent engages in the manufacture and non-retail sale of permanent mold aluminum castings at two plants near Kansas City. This process involves the forging, machining, and inspection of parts for various customers across foundry, processing, heat treat, machining, inspection, and shipping departments. In the machining department, there are seven "core" machines: the A77, A81, Okuma 1, Okuma 2, Okuma 3, Okuma 4, and Okuma 5. Hearing Transcript (hereinafter "Tr.") 347:17-23, 586:7-9, General Counsel's Exhibit ("GCX") 7. The Okumas ("OK") 1 and 2 are set up to run parts ordered by customer Getrag. Tr. 257:15-16, 347:22-23. OKs 3, 4, and 5 run parts for customer Detroit Diesel. Tr. 172:16-20, 173:5-6. The A77 and A81 are set up to run parts ordered by customer Volvo, but the A81 can also be set up to run parts for Mercury. Tr. 257:12-13, 262:12-17. The SH1 machine is used to process Hubbell handles (SH1). Tr. 272:8-9. The machines are run over the course of three shifts: A (morning/day), B (afternoon/day), and C (evening/overnight). Tr. 149:10-20. Generally, each

operator is tasked with running two machines simultaneously. Tr. 173:17-25, 174:14-16, 190:14-18, 486:13-16, 673:13-17.

Some machines can run parts for more than one customer if the machine is "switched over." Tr. 264:16-18, 265:4-6, 271:23 – 272:1. Once a machine has been computer programmed to run a particular part in the recent past, that part can again be pulled up and run. Tr. 174:23 – 175:9. Leads, along with Manufacturing Engineer Richie Moore, are responsible for switching or "changing" over machines to run different parts. Tr. 175:12-16, 176:6-12.

2. Lead Operator Position

One operator on each shift is also responsible for setting up machines, changing out chip hoppers, and making sure the other operators have what they need to run the parts expected of them on a particular shift. Tr. 241:10-15, 583:10-16. Employees commonly refer to this operator as the "lead." Tr. 241:8-9. Each department has a salaried "lead" for each shift. For instance, Andy King was the A shift lead for the machining department, Ken Forste was the lead for B shift, and Chris Armstrong was the lead for C shift. Tr. 758:9-10, Charging Party's Exhibit ("CPX") 5. The job description lists as one of the position's "Major Tasks" that the lead "May be required to relieve on machines during breaks, lunches or employee absence when necessary." Respondent's Exhibit ("RX") 2 at p. 1, ¶6. Leads must also be able to "load and change tools on your own including changing tool offset in the machine." *Id.* When business necessity demands it, when an operator is out, on weekends, or when a new operator is being trained, it is not uncommon for "leads" to run machines themselves in addition to their other duties. Tr. 189:21 – 190:5, 191:15-24, 583:18-22; RX 2. Andy King, the lead operator on the A shift, testified that he runs machines on weekends. Tr. 331:22-25. Because the C is the "night" shift and has fewer

operators, there is not as much work for the C shift "lead" as there is for the A and B shift leads. Tr. 584:11-13.

3. Personnel Structure

Jim Spalding has been president of Stahl Specialty Company since May 2007. Tr. 386:13-20. He is assisted by Human Resources Manager Courtney Wilkins, who in turn supervises Human Resources Administrator Jeanne Adams. Tr. 777:16-17, 808:10-14. Krishnan Venkatesan is Plant Manager at Respondent's Warrensburg facility. Tr. 687:1-3. The managers of the various departments report directly to Venkatesan, including Machining Manager Ken Stewart, Foundry Manager John McBride, and Maintenance Manager Jerry Helms (an hourly employee). Tr. 545:17-20, 576:15-16, 689:17-18. Vince Stowell was foundry supervisor on C shift, but he was an hourly, not managerial, employee.

4. Disciplinary Procedures

Respondent's Employee Handbook lists four steps of corrective action, but does not require that all four steps be followed in sequence before terminating an employee. Tr. 792:3-6. The Handbook explicitly states that "In most cases, progressive corrective action will occur in the following sequence…" and goes on to list a four step progressive discipline including a verbal warning, two written warnings, and termination of employment (GCX 3 at pp. 46-47). However, the Handbook further states that Stahl "reserves the right to determine appropriate level of action to be taken on a case by case basis in consideration of the circumstances involved." *Id*. For example, of four employees terminated from 2011 through August 2012, two were terminated after only one written reprimand, and the other two were terminated without *any* prior documentation. RX 6. Furthermore, "Violations of work rules or other breaches of conduct

which, in the judgment of Stahl Specialty Company, are inappropriate or detrimental to our business can result in disciplinary action up to and including termination." GCX 6.

B. The IBEW Campaign and Stahl's Response

1. Organizational Meetings in Late April/Early May 2012

Informal information meetings and conversations between the IBEW and Stahl employees began as early at the first of April 2012, when hourly employee Michelle Little ("Little") initiated contact with the IBEW via her husband. Tr. 133:16-19. The first union organizing meetings were held at Little's house. Tr. 134:5-8. Management first heard that a union campaign might be gearing up the first week of May. CPX 2.

Maintenance Manager Jerry Helms told Spalding that *one* employee (not "several") had been invited to a union meeting. Tr. 396:1-5, 410:5-6, 719:18-720:3. Helms never identified whether this employee was Armstrong. Tr. 399:18-21. All Venkatesan and Spalding knew was that a maintenance employee had been invited to a barbecue and *did not even attend*. Tr. 410:7-9. Spalding testified that over the summer, he knew of only three employees involved with the union: Michelle Little and two unnamed foundry employees. Tr. 435-454:8.

Similarly, Foundry Manager John McBride told Venkatesan that the only employee he knew by name who had attended the meeting was Michelle Little. Tr. 555:21 – 556:18. McBride testified that the names he knew were of employees whom he overheard discussing the union, not employees who had been "invited to a union organization meeting." Tr. 546:19-22, 554:17-20, 555:14-25, 556:3-6 and 14-18. Venkatesan told Spalding that McBride had reported that *one* "maintenance man had reported that he'd been invited to attend a meeting, that there was a barbecue over the weekend." Tr. 399:19-21, 404:12-13, 407:15-17. Spalding never testified that McBride gave him any names, and counsel for Charging Party did not press him on this point.

Tr. 424:23 – 425:9. Spalding repeatedly testified that he did not know (other than Little) who attended the meeting (Tr. 420:19-431:4), and as counsel for Charging Party helpfully observed on Spalding's behalf, "none of those people [Helms, McBride, Wilkins, or Venkatesan] would've known about who went to the meetings, right, because they [themselves] didn't go." Tr. 432:17 – 433:1. Therefore, as the campaign unfolded, Respondent had no knowledge of Armstrong's involvement, if any.

2. The IBEW Begins Open and Notorious Handbilling

The IBEW launched its formal organizing campaign at Stahl in May 2012. Tr. 195:5-12. The IBEW's lead organizer, Jerry Gulizia ("Gulizia"), handbilled on several occasions in the driveway to Respondent's Warrensburg plant.[1] Tr. 194:14-16. The handbilling was conducted on public property on and near a public road where anyone driving near the plant could see it. Tr. 204:1-7, 204:21-24. In late May or early June, Human Resources Administrator Jeanne Adams went to the back parking lot on two occasions to monitor the no-distribution/no-solicitation rules in the Employee Handbook and make sure that non-employees were not entering company property. Tr. 143:3-5; Tr. 746:22-24, GCX 3; Tr. 835:13-23. She observed Gulizia distributing handbills there. Tr. 198:4-8; Tr. 442:1-5, GCX 2. Spalding asked Venkatesan to make sure non-employees did not enter company property. Tr. 740:16-18. However, Venkatesan never assigned anyone specifically to watch the handbilling, and he did not know that Adams occasionally parked her car facing where the handbilling was taking place. Tr. 740:21-23, 746:3-6, 746:15-21.

3. In Response, Spalding Speaks to Employees

Spalding acted on information in an industry bulletin he subscribed to that a union campaign could move from organization to election in as few as seven days and consulted with

[1] Respondent has plants in Warrensburg and Kingsville, Missouri. Although there was organizing activity at both locations, this case involves events only at the Warrensburg plant.

legal counsel as soon as possible to train management on what they could and could not say in response. Tr. 428:20-12; 438:7-10, 439:9-15.

On May 8, 2012, Spalding spoke to each shift in response to the IBEW organizing campaign. Tr. 422:14-16. He drafted the script for this speech in coordination with an attorney. Tr. 421:21 – 422:8. Spalding never said the plant would close if the union came in. Tr. 531:19-21, 784:4-6, GCX 5. Rather, he said only that Respondent's parent company, Ligon, preferred to invest where it would be most profitable and that unions generally do not make companies profitable. Tr. 248:9-13, GCX 5. He further stated that Ligon "believe[s] in all of us here" and "believe[s] that we [can] be trusted to do our best to help them see a positive return on their investment." GCX 5. Spalding likewise assured employees that Ligon "is making the kinds of investments in this Plant that will insure that [employment] can continue to happen for years to come." *Id.*

4. Stewart and Armstrong Talk After the July 26 Meeting

On July 26, 2012, Spalding again spoke to hourly employees on each of the three shifts. Tr. 449:16-17, 783:9-13. Spalding spoke from the same prepared script during this speech as he had in May. Tr. 233:5-7, 233:14-16, 531:3-5, 783:16-19, GCX 5. Stewart spoke to Armstrong after the July meeting and asked him "why nobody spoke up or said anything during the meeting." Tr. 248:23-25. Armstrong responded that "[management] was just waiting for somebody to speak up and start argument [sic] with and put a red flag on them." Tr. 248:24 – 249:5. Stewart had never worked for a unionized company. Tr. 616:23 – 617:1. Stewart never asked Armstrong about his current union activities, never asked him why he "wanted" a union or why he thought Stahl needed a union, and did not know he was a union supporter. Tr. 578:1-7,

616:7-14 and 20-22. Armstrong never testified that he felt threatened or intimidated by Stewart's alleged questions. *See, e.g.,* Tr. 248:23 – 249:17.

5. Respondent Posts a Flyer in Response to Handbilling

During the organizing campaign, Respondent posted a flyer describing the collective bargaining process and the consequences of economic strikes, which read as follows:

> **UNION NEGOTIATIONS**
>
> If Stahl employees are foolish enough to believe Union promises and vote the IBEW in, what happens then? The Company and the Union would sit down at the bargaining table. Here's how it works:
>
> The Union is free to ask for anything and everything—free health insurance, retirement at full pay after 20 years of service, $5 across the board raises for everybody, no production standards, no layoffs and on and on.
>
> The Company is free to say NO to all these things. The Company is also free to make its own proposal – employees pay more for health insurance, lower pay grades, no matching 401(k) contributions, tighter production standards, etc.
>
> If the Company and the Union can't agree, the Company's final proposal goes into effect – even if it represents a cut for employees. The only thing the Union can do at that point is call for a strike.
>
> For any employee who goes out on strike, the Company is 100% free to hire a new worker to take the striker's place. When that happens, the new worker is legally entitled to keep the job, and the striker loses the job.
>
> **STRIKES**
>
> Strikes only happen at Companies that have unions. You've never heard about or read about a strike at a union free company.
>
> Strikes are not pleasant for anybody. There's usually violence, flat tires, hard feelings, and lost friendships as a result of strikes.
>
> Striking employees don't get health insurance coverage. Imagine how it would feel to have a really sick child while the Union has you out on an extended strike.
>
> Striking employees don't get paid. How would you pay your bills and feed your family?
>
> Strikers often lose their jobs. The Company has a right to continue operating during a strike and can hire new workers to replace strikers. When that happens, strikers lose their jobs – even if they give up on the strike and ask to come back to work.

The only way to be sure there is no strike is to stay union free.

Tr. 474:1-6, CPX 4, CPX 9 at p. 048.

C. The Discriminatee, Patrick "Chris" Armstrong

1. Armstrong's Job and Duties

Armstrong began working for Stahl around eighteen years ago. Tr. 240:14-17. At the time of the IBEW campaign, Armstrong was employed on C shift as a Production Machine Operator, referred to around the plant as a "lead." Tr. 241:8-10. His duties included but were not limited to training employees, answering questions, performing light maintenance, fixing alarms, checking lubricants, and driving the fork truck. Tr. 241:10-15. Armstrong had also been asked by Stewart to run machines in addition to these usual duties on at least one occasion. Tr. 267:20-24, 372:1-4. Armstrong acknowledged that leads often run machines on weekends. Tr. 294:10-12; *see also* GCX 10. If any personnel problems or issues arose on his shift, Armstrong was supposed to get in touch with the foundry supervisor, Stowell. Tr. 243:12-18.

Armstrong had also been "trained on . . . [Manufacturing Engineer Richie] Moore's job . . . a little bit" and never denied that he knew how to switch over machines. Tr. 265:7-10. In fact, Armstrong knew how to switch the A81 over to run Mercury parts instead of Volvo parts. Tr. 670:18 – 671:24. This skill is also part of Armstrong's job description. Tr. 671:13-24, RX 2 at ¶10 ("Must be able to set up fixtures 'jobs' on CNC machines").

2. Armstrong's Disciplinary History Prior to August 2012

Armstrong received four documented verbal warnings prior to his discharge—more than any other employee discharged in 2011 or 2012. Tr. 326:10-14, 497:22-24, GCX 8, 9, 10, 11. The first was in July 2011 for failing to ensure that he had changed out a tool correctly. GCX 8. He received a second warning in March 2012 for abusing the attendance policy. GCX 9. Armstrong's third warning was issued in March 2012 for underproduction:

> On March 23, 2012, you were working the weekend with one other person. You had 9.5 hrs. clocked onto DDC [Detroit Diesel Coolant] and ran production of 24 pcs. This machine should be getting 32 to 35 in 8 hrs

GCX 10. This warning contained a statement in the "Consequences of Further Infractions" section to "Follow the employee Handbook on Progressive Disciplinary Actions." *Id.* The only warning Armstrong received after the IBEW campaign began was in June 2012, for substandard work. Tr. 582:20 – 583:8, GCX 11. This June write-up stated in relevant part:

> you must be capable of functioning during the absence of Supervision. You must be capable of set-up and operation of all machinery in your designated area as well as communicate to your Manager on a daily basis any reasons as to why rates are not met during the shift. In situations where there is equipment down, manpower issues, or employee issues, you need to be communicating with the Foundry Shift Supervisor [Vince Stowell]. It is imperative that all equipment is running during the entire shift to meet customers [sic] demands. It is imperative that all shifts are providing the product needed to meet demands of customers on a daily basis. . . . Communicating and encouraging your co-workers is necessary for success as well

and noted in the "Consequences of Further Infractions" section that "Failure to meet the requirements of your job description will result in further disciplinary action, per the Employee Handbook." *Id.*

Armstrong's June warning implicitly addressed comments Armstrong had made to Charles Collins, an hourly machining employee. Tr. 564:20-21, 566:5-13. At the end of a shift during which Collins had produced about 900 parts, Armstrong told him to "slow down . . . because it makes it harder on everybody else and they [Stahl] would expect you to do that every night that you are on here." Tr. 566:15-18, 569:15-16, 570:2-4. As result of following Armstrong's advice, Collins was called into Stewart's office and received a verbal warning for low production. Tr. 566:23 – 567:3. During their meeting, Collins reported to Stewart that Armstrong also told Collins to "put down at least 600 or 700 because you make it hard on everybody else." Tr. 567:4-7. Armstrong also told Collins "not to do as much as [he] could because it would look bad on the rest of us" and "they don't want me to work my hardest

because if we work hard and we make our rate, then management will just see that and they'll expect that all the time." Tr. 581:9-18; 582:5-8.

Armstrong also told C shift hourly employee Mary Meade to "not hurt [herself] trying to go over what the Company was expecting out of us." Tr. 377:8-9.

3. Armstrong's Protected Activities During the Current IBEW Campaign

Armstrong attended nearly every union meeting, none of which were held at Respondent's plant. Tr. 134:7-11, 245:16-19. Armstrong also talked with organizer Jerry Gulizia after work while Gulizia was handbilling. Tr. 309:1-12. No witness (including Armstrong himself) testified that he "discussed the benefits of unionization with employees." No witness testified concerning how Armstrong's alleged role in the campaign compared to any other alleged participant's role. Wilkins never saw Armstrong wearing a union hat or button, like other IBEW supporters did. Tr. 813:5-19.

D. Events During C Shift on the Night of August 26-27, 2012

1. Machining Manager Ken Stewart Instructed Armstrong to Run a Machine and Ensure That Certain Other Machines Ran As Well

On August 26, Stewart and Plant Manager Krishnan Venkatesan conferred via telephone and text message to coordinate the staffing of machines they wanted to run during C shift. Tr. 585:23 – 586:3, 590:18-20, GCX 12, RX 4. Respondent was expediting Volvo and Mercury parts during the weekend in question, so Stewart and Venkatesan decided that there should be five operators running machines on C shift. Tr. 749:1-7, 756:20-23. However, one C shift employee, Kevin Wooldridge, was absent. Tr. 257:3-6. Also, one C shift employee, Mike Ridge, was trained to run only one type of machine: the air check. Tr. 260:15-17. Venkatesan therefore told Stewart that, given the low staffing and the need to expedite parts (at significant cost to

Respondent), Armstrong himself should run a machine that night and all "core" machines should be run as well. Tr. 750:17-24, 775:6-20.

Stewart later texted Armstrong his instructions for C shift. Tr. 301:2-9, 512:24 – 513:1, 576:16, 584:15-23, GCX 4. For a few weeks, Stewart had normally been sending Armstrong start-up instructions via text message. Tr. 301: 2-9. Stewart instructed Armstrong to distribute work among the four hourly C shift operators (Mary Meade, Randy Tucker, Mike Ridge, and Jessica Timmons) such that all "core" machines ran parts that night—including both the A81 and A77. Tr. 586:6-9, 605:19 – 606:2. He specifically texted Armstrong to "run all three Okumas on Detroit. Put someone on both Volvos [the A77 and A81] and don't worry about Getrag." Tr. 252:19-24, 257:10-13, GCX 4.

2. Venkatesan, via Stowell, Instructed Armstrong to Run a Machine

Venkatesan came out onto the plant floor around 8:00 PM before C shift started, "made an assessment of all the products that were in the plant and the status of everything in the production department and determined that there's a person missing on the shift and that Chris Armstrong needed to be on a machine that night." Tr. 648:8-15, 749:8-12. During that assessment, Venkatesan saw parts ready to run on both the A77 and A81. Tr. 669:23 – 670:14, 672:7-24. He then told the C shift foundry supervisor, Vince Stowell, that he wanted Armstrong to run a machine. Tr. 518:6-9, 519:21-25, 520:4-6. As foundry supervisor, Stowell was the only supervisor present during C shift. Tr. 516:25 – 517:8. Stowell came into the machining area from the foundry around 11:10 PM, at the beginning of C shift and told Armstrong that Venkatesan wanted two things to happen: 1) the A77, A81, Okuma 1, Okuma 2, and Okuma 5 machines specifically should be run, and 2) Armstrong should *personally* run a machine during his shift. Tr. 270:3-6, 519:22-25, 520:4-6, 522:14-19, 648:16-22. Stowell was unaware of any prior

production being run and found that the operating condition of the machining area at the beginning of C shift on 8/26-8/27 "looked like a normal Sunday night." Tr. 525:10-22, 526:14-17. Upon receiving Venkatesan's instructions from Stowell, Armstrong immediately told Stowell that he "didn't have time to run a machine," turned his back on him, and walked away. Tr. 520:10-12. Armstrong also told C shift operators during the night that he "did not have time" to run a machine himself, given his other duties. Tr. 270:15-17, 365:16 – 366:1, 374:10-20, 520:11-12 and 23-24. For instance, Armstrong told hourly C shift operator Mike Ridge that "he wasn't going to or didn't, wasn't, or didn't have time to" run a machine and was "upset" and "not too happy about" having been told to run one. Tr. 359:24 – 360:1, 361:3-7 and 13-15, 364:22 – 365:2.

3. Stowell Did Not See Armstrong Running a Machine.

Stowell supervised C shift in the foundry, not the machining department, and was responsible for making sure the foundry completed its own goals for the shift. Tr. 516:17-18, 527:21 – 528:1. He did not have time to continuously return to the machining department to see whether Armstrong was running a machine or not and was under no instructions to do so. However, Stowell passed through the machining area about "half a dozen" times that night and saw Armstrong twice. Tr. 526:18 – 527:2. Neither time was Armstrong running a machine personally or ensuring that both the A81 and A77 machines were running. Tr. 527:16-20. Armstrong testified that Stowell "walked through the Machining area two or three times" after Stowell "came and talked to [him] at the beginning of the shift." Tr. 277:18-21. Stowell saw Armstrong "standing" near the A81 machine he was supposed to make sure was running, reworking parts he had not been instructed to rework on the SH1, a machine he had not been instructed to run. Tr. 272:23 – 273:1, 527:13-15. After this observation, Stowell emailed

Venkatesan and Stewart to notify them that Armstrong was not following instructions and went back to his foundry duties. Tr. 494:4-7, 519:22 – 520:6, 527:16-20, 529:4-9, CPX 8.

Around 5:30 AM, well into C shift and only an hour and a half before A shift was due to begin, Stowell began preparing a Disciplinary Action Form (documented verbal warning) to be issued to Armstrong. Tr. 494:13-14, 529:1-3, CPX 8. It was not unusual for Stowell to move quickly to document a disciplinary infraction: Venkatesan testified that "if there is any incident that happened on a shift, [Stowell] was pretty prompt about writing his emails." Tr. 664:3-10. Spalding testified that he had "seen other discipline like this" and that he had seen "[some]one move to discipline somebody for a failure to perform a certain function or job during a shift less than two hours after the shift started." Tr. 495:10-17.

Stewart arrived at the plant around 6:30 AM on August 27, before C shift ended and A shift started at 7:00 AM. Tr. 591:25 – 592:2. First, he retrieved the night's production reports to see what machines had been run. Tr. 592:8-12. He immediately sought out Armstrong, the first person he talked to when he got to the plant that morning, for an explanation as to why he had not run a machine as instructed. Tr. 591:25 – 592:5.

E. Armstrong's Excuses and Respondent's Multiple Investigations

1. Armstrong's Excuses for Not Running a Machine as Instructed

Armstrong told Stewart that he had not run a machine (as he admitted he had been instructed) because: "he didn't have time [and] had other things that he was doing and couldn't get around to it" (Tr. 592:24-25); he had been "running the handles, which are Hubble [sic] handles, and that he had taken care of that and emptied some chip hoppers" (Tr. 593:5-7); and he "just did stuff. [He] had things, [he] was busy" (Tr. 595:5-6). Armstrong claimed he "tried to rework as many [handles] as I could while I was doing everything else" (Tr. 283:12-13) and "just

didn't have a lot of time" (Tr. 286:19-20). Armstrong claimed that he spent his time reworking or buffing "a few" handles. Tr. 272:18-20, 274:18-22. Armstrong testified that reworking parts was a job he "could have assigned to somebody" if "there wasn't enough machines for people to run," Tr. 305:11-20, but he did not assign that task to anyone else because he "had all [his] operators on a machine." Tr. 305:21-22. It would have taken Armstrong only about ten minutes to buff the 10-15 handles Stewart discovered had been buffed on C shift. Tr. 594:1-4. Armstrong also claimed that he spent much of the shift emptying baskets or chip hoppers. Tr. 265:15-17. However, the emptying process takes only five to ten minutes per trip, meaning it would have taken only about an hour to empty all the chip hoppers for all machines running that night. Tr. 343:16-7, 594:9-11.

Although Armstrong had run machines in the past, he believed the two sets of instructions conflicted and never followed up with Stowell or Venkatesan for further clarification. Tr. 276:5-11, 321:1-8, 372:1-4, 592:19-20. However, he acknowledged that both managers had instructed him to make sure the A77 and the A81 ran parts. Tr. 276:20 – 277:4. Armstrong did *not* assign someone to "both Volvos" (*i.e.*, the A81 and A77) as Stewart had instructed via text, nor did he make sure that both Volvo machines (the A81 and A77) ran parts. Tr. 257:10-13, 260:20-25, GCX 12. He claimed there were no *Volvo* parts to run on the A81, yet he neglected to run the Mercury parts that could also be run on the A81. Tr. 260:23 – 261:2, 262:12-23. Armstrong admitted that the A81 could have run Mercury parts if it had been switched over, but again, he just "didn't have time." CPX 8. Alternatively, Armstrong could have run the OK1 because there were Getrag parts ready to run there (just as Tucker ran Getrag parts on the OK2). Tr. 347:10-20, 672:9-12, 674:1-8.

2. Stewart's Investigation on the Morning of August 27

Because there were no written records generated that would document or quantify any of the indirect duties Armstrong claimed to have performed, Stewart went out onto the floor himself, examined the machines, and confirmed that Armstrong had not run the A81 and Okuma as instructed. Tr. 592:10-12 and 19-20, 601:11-16, 652:5-10, 675:8-9, CPX 5, CPX 7. Stewart spent about fifteen minutes "look[ing] at every one of the machines and noticed that none of them had been emptied." Tr. 593:19-22, 615:21-23, 667:23 – 668:2. He also picked up a random sampling of Hubbell handles to determine how many had been buffed, as it is "very obvious when one has been buffed and one has not," and found that only about 15 to 20 of the 400 available handles had been buffed. Tr. 594:1-4, 594:24 – 595:6, 611:10-12. It takes about ten minutes to buff 15 to 20 handles. Tr. 594:3-4.

Stewart met with Armstrong a second time on the morning of August 27, after he had inspected the machining department. Tr. 592:3-5. In both meetings Armstrong stated that he did not have time to follow the Plant Manager's instructions and gave false information regarding the extent of his activities during the shift. Tr. 284:6-19, 592:24-25, 667:2-5. Stewart wrote a report to Wilkins on Armstrong's failure to carry out the instructions he was given. Tr. 595:10-12, CPX 8.

3. Venkatesan's Follow-Up Investigation on the Morning of August 27

Venkatesan arrived at the plant around 8:00 AM and read the email from Stowell. Tr. 649:8-9 and 19, 669:23-25. He immediately spoke with Stowell and Stewart to gather more information about the events of the previous night's shift. Tr. 649:20 – 650:6, 651:3-5. Venkatesan undertook two different investigative efforts: reviewing feedback from Stewart on the results of Stewart's investigation into Armstrong's activities prior to the end of C shift, and

inspecting the machining department himself, where he saw full chip baskets at the A77 and A81 machines. Tr. 649:22 – 650:6, 666:18-24. He found that the A81 was set up to run Volvo parts, and he checked to make sure that parts were available for it. Tr. 669:1-22. Venkatesan's investigation resulted in the same conclusion as Stewart's: Armstrong had not run a machine as instructed, and he had not performed any of the duties he claimed had kept him "too busy" to run a machine.

Venkatesan had no power or authority to terminate Armstrong without input from the Human Resources department. Tr. 770:15-20, 774:10-12. Therefore, Armstrong was suspended and told to await contact from HR. Tr. 287:20-22, 598:4-7 and 14-16. The next day, Armstrong called Venkatesan and both admitted to and apologized for his actions on the previous shift. Tr. 286:1-12, 652:18-23, 653:4-8, 794:9-12, CPX 8.

4. No C Shift Hourly Employee Could Observe Armstrong All Night

Armstrong's story that for his entire shift he had been too busy to run a machine could not have been corroborated by any C shift employee. Jessica Timmons never saw Armstrong buffing handles because she could not see the entire machining department from where she was working on the OK5. Tr. 342:4-9. In fact, she could see only the OK3, OK4, OK5, and air/leak check machines. Tr. 340:7-24, GCX 7. Randy Tucker saw Armstrong buffing handles, but for only two or three 10-15 minute spells. Tr. 348:4-7, 352:7-14. Armstrong spent maybe 75 minutes fixing the scribe on Timmons's machine (Tr. 341:10-20) and only 25-50 minutes to empty her chip baskets (Tr. 343:10-17).

The only lead duties Mary Meade saw Armstrong perform were drive the fork truck and sweep the floors. Tr. 371:19-21, 373:21 – 374:2. Meade could not have seen Armstrong buffing handles because she was working the OK3 and sharing the OK4 with Timmons, who could not

see the area where the handles were near the SH2, since the OKs 3, 4, and 5 were all separated from the other part of the machining department by a wall. CPX 5.

Similarly, Tucker could see only part of the machining department from his post at the OK 2 and A77 machines. Tr. 347:17-21, GCX 7. All Mike Ridge saw Armstrong do was run the forklift. Tr. 361:19-21. Ridge (who has experience driving forklifts himself) further testified that there is only "about an hour's worth of [running the forklift] during a shift," and that "there's only like three or four of us working on C-shift, so you just make a couple of drops and a couple of pickups, so it's not a whole lot." Tr. 359:3-12, 361:22 – 362:2. None of the employees on C shift on August 26-27, 2012 were asked at the hearing whether they saw Stowell in the machining area that night, much less whether they saw him speak to Armstrong the first or any other time. Timmons, Tr. 338:10 – 344:8; Tucker, Tr. 345:18 – 353:24; Ridge, Tr. 355:6 – 368:1; Meade, Tr. 339:15 – 377:15. Armstrong further claimed that he had to clean up a "mess" left behind by the previous shift. Tr. 250:7-16, 305:1-3. Nevertheless, Armstrong clocked 8.58 hours. CPX 6.

Despite Armstrong's claims about the lack of available parts to run, the A shift, which immediately followed C shift on August 27, successfully ran the A81. Tr. 596:14-18.

F. <u>Armstrong Is Terminated After Still Further Investigation.</u>

Venkatesan reported Armstrong's insubordination to Spalding and recommended that Armstrong be terminated. CPX 8. Spalding then enlisted Human Resources Manager Courtney Wilkins to review Armstrong's file and determine the appropriate level of discipline for Armstrong's insubordination. CPX 8. She first corrected Venkatesan's mistaken recollection that Armstrong had been suspended on a prior occasion in 2012, which was not true. Tr. 673:11-12, CPX 8. She also asked Stowell on August 28 why he did not ask Armstrong why he was not

running a machine, and Stowell verified that he was focused on issues in the foundry and "felt that Chris is a lead person and should be able to carry out the instructions provided." CPX 8.

Upon initial review of Armstrong's file, which was incomplete in that it contained only two documented verbal warnings, Wilkins initially recommended that he receive only a three-day suspension and a final written warning for his insubordination. Tr. 790:14-16. However, Wilkins was then informed that Armstrong had in fact received two other documented verbal warnings. Tr. 790:19-22, 791:23 – 792:2. These warnings contained further information along the same lines as Armstrong's most recent infraction, *i.e.*, "sub-standard" work, and Wilkins believed they warranted modifying her original recommendation from mere suspension to full termination. Tr. 791:23 – 792:2. To the extent Wilkins was ever "confused" about whether Armstrong should be terminated, that confusion ended once she formed a complete picture of his prior disciplinary history. Tr. 676:15-19, 790:17-22, 791:6-11.

On August 30, 2012, Armstrong was discharged for gross negligence and false reporting. Tr. 496:10-12, 677:19-23, GCX 6. During the discharge meeting, Armstrong never claimed that he had received conflicting instructions from Venkatesan and Stewart. Tr. 656:5-7, 794:24 – 795:1. Armstrong never denied that he received all four disciplines upon which the decision to terminate his employment, in conjunction with his neglect of duties and untruthfulness about the extent of his actions, were based. Tr. 297:10-12, 299:6-9. After his termination, Armstrong began handbilling for the IBEW. Tr. 196:13-14, 202:25 – 203:2, 245:5-11, 246:9-10, 309:1-3.

III. QUESTIONS PRESENTED IN RESPONDENT'S EXCEPTIONS

A. Whether the Issuance of the Complaint in This Matter and ALJ's Decision Are Invalid Under Current Law.

The Acting General Counsel lacked authority to issue the Complaint and authorize proceedings in this matter given the circumstances of his appointment and provisions of the

Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.* . *See SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015); *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 552 (9th Cir. 2016); *Hooks v. Kitsap,* Order Granting Resp.'s Mot. to Dismiss, Case No. 3:13-cv-05470-BHS, 2013 WL 4094344 (W.D. Wash., Aug. 13, 2013).[2] As explained in those decisions, the Acting General Counsel lost any authority as Acting General Counsel when the President nominated him to be General Counsel. Therefore, his actions after that time, including those in this proceeding, are voidable and should be voided here. Furthermore, the ALJ lacked authority to issue a Decision and Order in this matter, as she was appointed by an unconstitutionally-comprised National Labor Relations Board. *See N.L.R.B. v. New Vista Nursing and Rehab.,* Opinion, Case No. 11-3440 (3d Cir. Mar. 19, 2013), *N.L.R.B. v. Enterprise Leasing Co. Southeast, Inc.,* Opinion, Case No. 12-1514 (4th Cir. July 17, 2013), and *N.L.R.B. v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550, 2578, 189 L. Ed. 2d 538 (2014). . The actions of the General Counsel and ALJ in reaffirming the decisions of their predecessors and/or their own decisions in this case in an effort to cure these fatal flaws cannot cure the defects because those procedures lacked any substantive, meaningful review or reconsideration and did not present Respondent with any opportunity to object or be heard. Such lack of actual reconsideration or review is demonstrated by the ALJ's failure to remedy the inexplicable internal inconsistency and error described in Respondent's Exception 127. In her

[2] Respondent did not waive this defense and objection, because it timely raised the issue of the Acting General Counsel's lack of authority in its Exceptions and Supporting Brief as well as in its Reply Brief in Support of its Exceptions, cited to authority in support of its position, and presented its exceptions, briefing, and legal authority in a manner sufficient to inform all parties of the substance of Respondent's objections by a concise statement of the grounds for the objection and the specific question of law at issue. *See* Section 102.46(b)(1) of the Board's Rules and Regulations. Unlike a "bare exception" presented with "no argument", Respondent excepted to the authority of Acting General Counsel in this matter and expressly cited to the authority of *Hooks v. Kitsap*, an approximately 2-page long order providing an concise explanation of the Respondent's legal basis for the presented exception. *Compare Industrial Contractors Skanska, Inc.*, 362 NLRB No. 169, slip op. at 1 fn.1 (2015) (rejecting an exception where "[t]he General Counsel presented no argument in support of this exception."); *The Earthgrains Company and Bakery*, 351 NLRB 733, 733 fn.1 (2007) (disregarding "merely bare exceptions unsupported by argument in the Respondent's brief").

prior Decision that has now be ratified and adopted without alteration, the ALJ contradicted herself by finding as a fact that the General Counsel introduced no evidence to support an allegation in the complaint but nonetheless concluded that the Respondent committed the alleged violation despite there being no evidence to support the allegation. Had the purported remand and associated review and reaffirmation been meaningful or substantive, as opposed to a sham, the ALJ surely would have corrected this obvious flaw in the Decision. To avoid waiver, Respondent reserves the right to submit further briefing on this question.

B. Whether the ALJ's Credibility Findings Are Supported by the Evidence, and Whether Respondent Is Prejudiced by the Same.

The ALJ outrageously found Venkatesan to be the least credible witnesses she has ever heard as a judge, and his overall testimony "dismal." Order at p. 12, note 28; p. 18, note 37. Venkatesan has spent nearly twenty-five years in the United States and holds both an MBA and a PhD in industrial engineering. Tr. 698:13-14, 718:7-9, 736:8-9. He is of Indian descent but speaks perfect English, although he carries a somewhat heavy accent and has a dry delivery. Respondent has been highly prejudiced by the ALJ's interpretation of the manifestation of these cultural attributes as "evasive, confusing, and vague responses" (Order at p. 12, note 28). Venkatesan's forgetting always to speak clearly into the microphone, tendency to trail off at the end of his answers, and failure to remain upbeat in the face of several hours of aggressive, condescending, and often sarcastic questioning by Counsel for Charging Party,[3] encompassing such tangential and tiresome topics as the founder of time studies (Tr. 718:10-25) and whether Venkatesan had "ever heard of the notion that somebody gets a fair trial before they get punished" (Tr. 766:22-25), can hardly fairly be construed as "deliberate nonresponsive answers."

[3] Counsel for Charging Party even tried to recast Venkatesan's response about a "union vote" as a "union *war*." Tr. 699:12-18. His antics exhausted even the ALJ, who admonished Counsel for Charging Party on several occasions to "move on" because she "got it."

Order at p. 12, note. Nor should the ability of Respondent's counsel, who was familiar with Venkatesan's speech patterns, accent, and mode of delivery, to elicit clearer answers from Venkatesan fairly be considered "tailor[ing] many of his answers to conform to the responses he felt would best help Respondent's attorney." Order at p. 12, note 28. The ALJ cannot possibly know what Venkatesan "felt" the outcome of his answers would be.

Her nearly universal dismissal of Venkatesan's testimony on every issue highly prejudiced Respondent, in that Venkatesan (as did Stewart) directly refuted much of Armstrong's conveniently "credible" testimony regarding such crucial points as the availability of Volvo parts for the A81 (Order at 12:21-22) and what duties Armstrong claimed to have performed instead of running a machine (Order at 13:11-17). Most importantly, an unbiased assessment of Venkatesan's credibility would also reverse the ALJ's finding as to whether Respondent knew of Armstrong's protected activities (*Id.* at 18:12-16).[4]

The ALJ also dismissed Spalding's testimony as generally incredible, based primarily upon nothing more than her biased interpretation of his nervous facial expressions and tendency to purse his lips after responding as "smirks" (Order at p. 8, note 19) and his considered, deliberate reflection before answering each question as "pregnant pauses" (*Id.*). Yet the ALJ apparently could not consistently apply her incredulity. For example, the ALJ found that there was "no evidence that [Spalding] had first-hand knowledge of Adam's [sic] role in the handbilling surveillance," which directly contradicted her finding at 6:36-37 that "Spalding told Adams to investigate and ensure there was no handbilling on company property." Tr. 819:20 –

[4] The ALJ acknowledges that McBride endured "unnecessarily redundant questioning by counsel for the Charging Party on this point" (Order at p. 18, note 36), but nevertheless inexplicably chose to credit McBride's *second* answer (after the badgering) rather than his first. Given the ALJ's complete discrediting of Venkatesan's testimony, McBride is therefore the only, and tenuous, basis upon which the General Counsel can attempt to show knowledge of Armstrong's protected activities. Venkatesan's testimony corroborates McBride's original answer to the question of which names McBride gave to management (*i.e.*, only Michelle Little). Tr. 555:16-25.

820:4. Despite the ALJ's general disbelief of Spalding's testimony, surely at the least he could be relied upon to have first-hand knowledge of his own instructions.

The ALJ found Armstrong universally credible, despite the fact that other hourly employees contradicted crucial aspects of his testimony. For example, Little testified that it would have been feasible for Armstrong to have changed over the A81 to run Mercury parts instead of Volvo ones. Stowell, who the ALJ generally found credible, also testified that he never saw Armstrong working. Also, Collins corroborated Stewart's testimony regarding Armstrong's instructions that Collins purposefully underproduce parts so that other employees wouldn't be expected to be as productive. Lastly, the ALJ often simply inserted her own interpretation of Armstrong's incomplete testimony, or supplied a convenient meaning for complete testimony, as when she found that Armstrong called Stewart to tell him "the reason he could not operate the A81" in the face of Armstrong's testimony that he called Stewart to get "clarification" as to how many employees to assign to which machines. Order at 13:4-6, Tr. 277:2-9.

The ALJ failed to make any explicit credibility determinations as to the other C shift workers, despite their identical and self-serving answers to certain lines of questioning.[5] The ALJ also failed to find that their collective testimony proves they would not have been able to provide any information to absolve Armstrong had they been interviewed in August 2012. This failure further prejudices Respondent, in that it ignores the inevitable conclusion that even had Respondent further expanded its investigations into Armstrong's claims (as the ALJ wished), no information could have been gleaned from C shift as to how Armstrong accounted for all 8.58 hours he clocked on August 26-27.

[5] For example, Meade contradicted Timmons' testimony that Armstrong "never" ran a machine (Tr. 339:19-20), and everyone but Meade testified that Armstrong told them not to "hurt themselves" in a hypothetical safety context in response to questioning clearly designed to get at whether Armstrong was in fact telling employees not to try very hard or go over production quotas, as Collins reported to Stewart. (*See, e.g.*, Timmons, Tr. 344:1-7)

Furthermore, the ALJ inexplicably made no credibility finding whatsoever as to hourly employee Charles Collins, despite his direct contradiction of Armstrong's testimony. Armstrong expressly denied telling Collins to cut down his overachieving production to keep the rest of the workers from either "looking bad" or having the company start expecting such high production out of everyone, but the ALJ made no credibility determination as to Collins' testimony concerning the same conversation. Whatever the ALJ thought about Stewart's testimony, she did not bother to make a credibility finding concerning Collins on this crucial issue of a second warning Armstrong had received for substandard work. GCX 11. Where the testimony of two witnesses is equally credible, the General Counsel fails to carry its burden to prove a fact by the preponderance of the evidence, and Respondent is entitled to prevail on that point. *Central National Gottesman,* 303 N.L.R.B. 143, 145 (1991). Therefore, Respondent was heavily prejudiced by the ALJ's failure to make a credibility determination regarding Collins: if she had found that he was equally as credible as Armstrong, Respondent would be able to rely on Collins's testimony to establish yet another incident of Armstrong being involved in underperformance on a shift. Furthermore, a finding that Collins's testimony was credible would have tended to increase Stewart's credibility as well, since Collins' testimony on this issue corroborated Stewart's.

C. Whether the ALJ Erred in Holding That Respondent Unlawfully Discharged Armstrong.

The ALJ's erroneous conclusion that Respondent discharged Armstrong because of his protected concerted activities results from an unfounded leap in logic connecting an "inadequate investigation" (Order at 19:19) with alleged discriminatory animus on behalf of Respondent. The preponderance of the evidence does not show that the General Counsel carried its burden, and even if it did, Respondent presented ample evidence sufficient to establish that Armstrong would

have been terminated regardless of his protected activities given his disciplinary history. The ALJ implicitly agreed that Armstrong had engaged in misconduct by finding that termination was too severe a penalty for insubordination. Order at 24:19-22. The real issue, therefore, is whether Respondent's decision to terminate Armstrong, rather than recommend lighter discipline stemmed from union animus. The ALJ's findings of law on this allegation are due to be reversed.

1. Respondent Had No Knowledge of Armstrong's Protected Activities.

The General Counsel must prove that the employer had knowledge of the discriminatee's alleged protected activities. *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982) (burden shifts to employer only if protected activity, employer knowledge, and a nexus between the adverse employment action and protected activity can be proven). However, an employer may discharge an employee *even where union activity is a motivating factor*, if it proves that the termination decision would have been the same absent the protected conduct. *N.L.R.B. v. Trans. Mgmt. Corp.*, 462 U.S. 393 (1983). Furthermore, knowledge only that an employee has attended a union meeting, in the absence of other factors, cannot support a finding of a discriminatory motive. *See, e.g., Lawson Milk Co. v. N.L.R.B.*, 317 F.2d 756 (6th Cir. 1963) (reversing 8(a)(1) violation where knowledge that an employee had attended a union meeting coupled with truthful comments from the employer that the employee "had something to do with the uprising as to the union," which were stated without union animus and not made as part of a threat of reprisal, did not "insulate" employee from adverse employment decision); *see also Summit Healthcare Assoc.*, 357 N.L.R.B. No. 134, at *18 (2011) ("The Board has long held that an employee may be dismissed for any reason, or no reason at all, so long as the employee's Section 7 activity is not the basis for the discharge").

Why should it "strain credulity," as the ALJ found, for Spalding not to have known of Armstrong's support for the IBEW in August 2012 (Tr. 820:7-11 and 16-18)? Armstrong gave undisputed testimony (corroborated by Gulizia) that he did not begin handbilling until *after* his discharge. Venkatesan and Spalding both testified that they had no knowledge of Armstrong's union involvement. Tr. 721:9-13, 820:7-11. Multiple witnesses testified that the only name for sure associated with the union was Michelle Little, and there may have been some unidentified foundry employees who attended the meetings as well. Gulizia's self-serving testimony that Armstrong solicited authorization cards during the 2012 IBEW campaign was uncorroborated by any testimony from Armstrong himself. Tr. 194:25 – 195:2. Therefore, the General Counsel can point to no record evidence that Respondent knew that Armstrong was actively involved in supporting the IBEW, and Respondent is entitled to prevail on this issue.

2. Respondent's Multiple Investigations Into Armstrong's Claims Were Fair and Meaningful

Whether an investigation is so inadequate as to support an inference of discrimination is reviewed under the substantial evidence standard. *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. N.L.R.B.,* 414 F.3d 158 (1st Cir. 2005). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Richardson v. Perales,* 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 229 (1938). Furthermore, where an employer has obtained evidence of misconduct, it does not need to prove that the employee engaged in the alleged offenses. *A & G, Inc. d/b/a Alstyle Apparel,* 351 N.L.R.B. 1287, 1300 (2007). Rather, the employer must show merely that it had a "reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged [him]." *McKesson Drug Co.*, 337 N.L.R.B. 935, 936 n.7 (2002); *see also Yuker Construction,* 335 N.L.R.B. 1072

(2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity).

Respondent engaged in no fewer than ***seven*** investigatory conversations, observations, reviews, and interviews over three days before reaching its decision to terminate Armstrong: Stewart's two meetings with Armstrong on the morning of August 27, Stewart's investigation of the machining department, Venkatesan's conferral with Stowell, Venkatesan's follow-up investigation of the machining department, Wilkins' conferral with Stowell, and Wilkins' review of Armstrong's personnel file. While the ALJ may be disappointed in the findings of such investigations, their existence, depth, or results cannot be ignored.

In the instant matter it was unnecessary for Respondent to have asked every other C shift employee what Armstrong was doing on the night of August 26-27. As they each testified at the hearing, no C shift employee was in a position to observe Armstrong's activities for the entire evening. Even if Stewart or Venkatesan had interviewed C shift on August 27, they would not have provided any information sufficient to change the managers' conclusion that Armstrong not only had not run a machine as instructed, but had also not done any other substantial work during his shift. None of them testified that Armstrong had run a machine.

Armstrong falsely reported the *extent* of his activities preventing him from carrying out uncontested instructions to run a machine, if not the *type* of activities themselves. He may very well have emptied chip hoppers, fixed Timmons' scribe, and/or buffed some handles. However, his false report stems from the fact that his story about how he had *so much* to do that he categorically had absolutely no time to carry out uncontested instructions from the Plant Manager to run a machine did not hold up to either Venkatesan's and Stewart's inspections or

the testimony of his C-shift co-workers, whom the ALJ either found more credible than Respondent's witnesses or failed to make any adverse credibility determination.

It cannot be ignored that the C shift employees who were questioned under oath at the hearing did not corroborate Armstrong's story on many levels, from Meade testifying that she had seen Armstrong run machines before on weekends, to Timmons admitting that she could not see half the machining area from where she worked, to Tucker admitting that he saw Armstrong buffing handles for about an hour at most and that it takes only about an hour to drive the fork truck with five employees working.

Stewart's was the most thorough and timely investigation (*i.e.,* it took longer than Venkatesan's and took place much closer to, if not at least partially before, the end of C shift). Armstrong notably provided no testimony as to how many handles he claimed to have buffed, so Stewart's testimony that only 15-20 had been buffed is undisputed. C shift was short-staffed and had one employee (Ridge) who was trained to work only one machine (the air leak/check). Therefore, only three employees other than Armstrong were available to run the core machines. The ALJ's foray into whether Venkatesan asked someone on A shift to run a machine because Holsey was out is irrelevant, since A shift had more employees than C shift. In other words, there were plenty of employees to distribute between the machines without the lead having to run one on A shift. *See* Order at 19:37-43.

3. Armstrong Would Have Been Terminated Despite His Protected Activities.

"Where antiunion animus is established in connection with discharge of employee, employer will be found to have violated National Labor Relations Act unless it demonstrates by preponderance of the evidence that worker would have been discharged even if he had not been involved with the union." *Presbyterian/St. Luke's Med. Ctr. v. N.L.R.B.*, 723 F.2d 1468, 1479

(10th Cir. 1983); *see also Chicago Tribune Co. v. N.L.R.B.*, 962 F.2d 712, 716 (7th Cir. 1992) ("Generally the conclusion that discipline or discharge constitutes an unfair labor practice, that it is pretextual or the result of dual motive, can be reached only after a *prima facie* showing by a preponderance of the evidence that the employer acted because of antiunion animus, antiunion motive. . . . Union activism, however, is not an impenetrable shield against discharge, and the Act itself does not give union adherents job tenure.") (internal quotations omitted). The General Counsel failed to show a nexus between Armstrong's protected activity and his termination, as required under *Wright Line.* Therefore, the ALJ's findings on this issue should be reversed.

The ALJ impermissibly substituted her own opinion of Armstrong's disciplinary record for Respondent's judgment. For example, she dismissively categorized all of Armstrong's prior warnings as being for "minor" offenses. Instructing employees to lower their production, failing to work to production standards himself, and abusing the attendance policy are not "minor" offenses to a company trying to stay profitable and meet customers' demands in a lagging economy.[6] Respondent had recently terminated other employees, all of whom had fewer documented warnings than Armstrong. The totality of the circumstances in the instant matter, including the number and extensiveness of Respondent's investigations into Armstrong's claims, defeats a finding that Respondent terminated Armstrong out of union animus.

This is not as extreme a case as *Midnight Rose Hotel & Casino,* 343 N.L.R.B. 1003 (2004), wherein the discriminatee was not interviewed and was not suspended pending an investigation. By contrast, Armstrong was given several chances to explain what he did on the

[6] Although the ALJ engaged with this red herring topic extensively, Respondent does not have a policy regarding how long an infraction remains on an employee's record. Venkatesan testified that he did not know how long discipline stays on employees' records, that he had never told an employee that discipline is wiped off their record after one year, and that he had never heard that said by any supervisor or manager to any employee. Tr. 678:11-25. Wilkins testified that Respondent did not have a policy with respect to how long disciplinary actions are kept in an employee's file; she never said it was "not Respondent's policy to remove discipline from employees' files after a year." Tr. 803:11-13.

night of August 26-27, but management found his explanation lacking given their review of the machining department the morning of August 27, the fact that A shift was able to start immediately running parts, and the production report corroborating Armstrong's admission that he had not run a machine. Therefore, Respondent had a reasonable belief that Armstrong had been insubordinate and had not performed work to the extent he claimed to have done on August 26-27. If Respondent wanted to terminate Armstrong because of his protected activities, it would have done so as soon as it had knowledge of the same (*i.e.*, allegedly in May 2012). It would be absurd for Respondent to keep Armstrong on for nearly four months, including nearly two months after the June warning for substandard work.

Armstrong's June 29 warning did not contain the same language concerning "following the progressive disciplinary steps" as did the other documented verbal warnings he received; rather, it said "Failure to meet the requirements of your job description will result in further disciplinary action, per the Employee Handbook." As the ALJ already found, the Handbook explicitly states that Stahl "reserves the right to determine appropriate level of action to be taken on a case by case basis in consideration of the circumstances involved." 15:5-6; GCX 3 at p. 47. How long a write-up stays in an employee's file is irrelevant to a determination concerning Respondent's disciplinary policy.[7] Armstrong had received three warnings within six months of his termination, and two of those were issued prior to the union campaign. Therefore, even assuming *arguendo* that Respondent did keep write-ups on file for a year, that policy was followed with respect to Armstrong, and Respondent cannot be accused of harboring union

[7] Despite the ALJ's finding that Wilkins was a "relatively credible witness" (Order at p. 23, note 40, the highest praise reserved for any of Respondent's witnesses), particularly on "undisputed facts and personnel procedures," the ALJ inexplicably refused to credit her testimony on precisely such a "personnel procedure:" how long disciplines are kept in employees' files.

animus toward Armstrong with the 2011 warning, much less with regard to the two March 2012 warnings, which were issued prior to the beginning of the IBEW campaign.

D. Whether the ALJ Erred in Holding That Respondent Engaged in Unlawful Surveillance of Handbilling.

The ALJ erroneously held that Respondent engaged in unlawful surveillance. "[A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." *Snyder's of Hanover, Inc. v. N.L.R.B.*, 39 F. App'x 730, 735 (3d Cir. 2002), quoting *Hoschton Garment Co.*, 279 N.L.R.B. 565, 567 (1986); *see also Alcoa, Inc. and Alcoa Commercial Windows, LLC*, 2013 WL 5305835 (Sept. 20, 2013). Rather, to constitute *unlawful* surveillance, the employer's observations must be more than "merely casual in nature" and amount to a "deliberate attempt to interfere with the legitimate union activity of employees." *Brown Trans. Corp. v. N.L.R.B.*, 294 N.L.R.B. 969, 971 (1989). There is no requirement that a company "turn its head" or "close its eyes" when employees engage in open and notorious union activity. *Fairfax Hospital*, 310 N.L.R.B. 299, 310 (1993). Furthermore, the alleged unlawful surveillance must objectively tend to restrain or coerce employees in the exercise of their Section 7 rights. *Aladdin Gaming*, 345 N.L.R.B. 585 (2005); *see also Roadway Package Sys.*, 302 N.L.R.B. 961, 961 (1991).

IBEW organizer Gulizia passed out union propaganda at the employee entrance to Respondent's plant in broad daylight at the beginning and ending of each shift for months. Tr. 196:5-9. Respondent could not help but casually observe his actions. Through a window in the foundry, Venkatesan observed a union organizer approaching cars and handing out papers. Tr. 724:18-23, 725:14-16. Venkatesan observed this on two occasions, 2-3 minutes each time. Tr. 729:16-21. He happened to glance out of those particular windows merely because he was checking on the rebuilding of the line on Sub No. 10. Tr. 730:19-25. No management employee

who observed the handbilling ever interfered with the union's efforts, but rather engaged in observation of open, public activity on or near Respondent's property. Respondent's actions fall far short of the extraordinary measures taken by the employer in *Fairfax Hospital*, for instance—Respondent did not take pictures of union activity or use camera or videotape to enhance its vision of what could already be seen. Therefore, these observations fail to rise to the level of unlawful surveillance, and this charge is due to be dismissed.

The ALJ drew an erroneous connection between Gulizia's testimony at pp. 199-201 that he could not recognize two men observing him from a distance, and his testimony on p. 207 that hourly employees identified Respondent's salaried employees to Gulizia. There is absolutely no record evidence that the two "unknown" men, who were standing near a doorway so far away from Gulizia that he admitted he could not see their physical features, were managerial employees. Tr. 200:11-16. To the extent it is just as likely that these men were actually hourly employees, this finding of "fact" is erroneous, impermissible, and due to be disregarded. Awareness is not surveillance.

Similarly, there is no record evidence connecting Venkatesan's awareness of when handbilling occurred to any surveillance in which he allegedly may have participated. It is not unlawful for an employer to be aware of handbilling occurring near its property. The ALJ inexplicably failed to find that because construction was going on in that area of Respondent's plant at the time, Venkatesan was generally spending time near the foundry windows. Tr. 730:17-25. Regardless of Venkatesan's credibility as to whether he meant to observe handbilling while casually looking out the window, any such credibility determination is irrelevant in the face of the fact that the underlying activity does not rise to the level of unlawful surveillance.

E. Whether the ALJ Erred in Holding That Respondent Interrogated Armstrong About His Protected Activities.

To constitute interrogation under the Act, an employer's questioning of hourly employees must go beyond mere curiosity and make the employee feel threatened. *See, e.g., N.L.R.B. v. Montgomery Ward & Co.*, 192 F.2d 160, 163 (2d Cir. 1951) ("inquiries made by the manager concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union, were not unlawful"). There is no 8(a)(1) violation where "The supervisor made no threats nor intimated that [an employee] might be subject to reprisal because of her union activities. When [the employee] said she could not remember requested information, the supervisor did not press the matter. No attempt was made to interrogate [the employee] about the union sympathies of other employees." *N.L.R.B. v. Seamprufe, Inc.*, 382 F.2d 820, 821 (10th Cir. 1967). The conduct at issue here did not rise to the level of interrogation, and therefore the ALJ's finding must be reversed.

While a violation of § 8(a)(1) may exist even where the evidence does not show that employees were *actually* intimidated or coerced by an employer's conduct, the evidence still must demonstrate that, taken from the point of view of the employees, the reasonable tendency of the employer's conduct or statements is "coercive in effect." *See N.L.R.B. v. Dickinson Press Inc.*, 153 F.3d 282, 286 (6th Cir. 1998); *Peabody Coal v. N.L.R.B.*, 725 F.2d 357 (6th Cir. 1984). When Stewart spoke to Armstrong after the July meeting, he made no threat of reprisal, did not press Armstrong as to why no employees had spoken up during the meeting, made no promises of favor or benefit if Armstrong would cease supporting the IBEW, and did not ask Armstrong about other employees' union sympathies. Armstrong never testified that he felt threatened or intimidated during their conversation, and he did not testify that he ceased supporting the IBEW

after the conversation. The General Counsel elicited no testimony showing that anything about this conversation was threatening or coercive, therefore the ALJ's finding on this issue is similarly due to be reversed.

F. Whether the ALJ Erred in Holding That Respondent Threatened Plant Closure.

It is well established that an employer can communicate any of its general views about unions to employees as long as the employer limits statements to what it reasonably believes the likely economic consequences of unionization may be. *See, e.g., N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575 (1969); *see also N.L.R.B. v. River Togs, Inc.,* 382 F.2d 298 (2d Cir. 1967). Section 8(c) of the Act explicitly provides that an employer can express "any views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). "Under Section 8(c) an employer is free to communicate to employees a statement of opinion about the union as well as predict the effect of unionization on the workplace so long as such a prediction is based on objectively verifiable facts and it does not contain a threat of reprisal or force." *Brown & Root, Inc. v. N.L.R.B.*, 333 F.3d 628, 633 (5th Cir. 2003) (reversing finding of 8(a)(1) violation where employer stated "Brown & Root was a non-union company and was going to stay that way"). An unlawful threat is established only where "the totality of the circumstances reveals an employee reasonably could conclude the employer is threatening economic reprisals if the employee supports the union." *Selkirk Metalbestos, NA v. N.L.R.B.*, 116 F.3d 782, 788 (5th Cir. 1997).

Language in company speeches and postings must be taken in context. Even in cases where such words as "close" or "plant closure" have been overtly spoken, the Board has been hesitant to find a violation. *Miller Indust. Towing Equip., Inc.,* 342 N.L.R.B. No. 112, at 1075 (Sept. 17, 2004) (general manager's statement to employee regarding "the possibility of plant

closures if there is a Union due to costing the company money" was "vague and too abbreviated to constitute sufficient evidence of a threat"). The Board has also discredited testimony regarding threats of closure where only a tiny fraction of the company's employees came forward to testify that they had heard such alleged threats. *See, e.g., Target Corp.*, 2012 LEXIS N.L.R.B. 275, at *31 (May 18, 2012). In addition, the Board has refused to find an 8(a)(1) violation where the employer's operations manager testified that he "read the script verbatim and did not expand on its contents" and the only contrary evidence was the uncorroborated testimony of one employee, who testified "in response to a leading question" that the employer "could close the building if the company lost clients." *See, e.g., UPS Supply Chain Solutions, Inc.*, 357 N.L.R.B. No. 106, at 8 (Nov. 4, 2011); *see also Target Corp.*, 2012 LEXIS N.L.R.B. 275, at *12 (at least four meetings held at which VP of Human Resources and a store manager read from scripts in order to "give a consistent message to all workers").

The only testimony elicited at the hearing regarding whether Spalding's remarks threatened "economic reprisals" was from Armstrong and Hunsburger, whose latter testimony the ALJ found to be generally as credible as Spalding's. Order at p. 9, note 21. Hunsburger testified merely that Spalding "talked about the money that our parent company, Ligon, had invested in Stahl [and] that he wanted them to continue investing money in Stahl. He said . . . Ligon purchases companies that are non-union for that reason, because they are non-union. He mentioned something about our customers would have to have a guarantee that their supply lines would be, stay full, investing money in other warehouses, this like this, like strike protection." Tr. 222:20 – 223:4. Similarly, Armstrong testified that Spalding said in his speech that "Ligon only investigated [sic-invested] it's [sic] money in . . . profitable companies and that unions . . . won't make Stahl profitable." Tr. 248:6-8. Nothing in this testimony remotely conveys that

hourly employees understood Spalding to be threatening economic reprisals, "reasonably" or otherwise. Since the ALJ found Hunsburger's and Spalding's testimony to be equally credible (Order at p. 9, note 21), it must follow that the General Counsel failed to carry its burden of proof on this allegation. *See, e.g., Central National Gottesman,* 303 N.L.R.B. 143, 145 (1991). Likewise, since the ALJ found Armstrong to be credible on every point to which he testified, his testimony regarding this allegation cannot, by a preponderance of the evidence, credibly support a finding of an 8(a)(1) violation.

Spalding's speech contained true statements about Respondent's parent company's business preferences. *See, e.g., N.L.R.B. v. Flemingsburg Mfg. Co.,* 300 F.2d 182 (6th Cir. 1962) (plant manager's statement, during organizing campaign, that labor costs would increase and there would be no purpose for its sole customer to continue to send its work to the plant if the union came in was exercise of free speech right and did not constitute unfair labor practice); *Grede Foundries, Inc.,* 205 N.L.R.B. 39 (1973) (statement by president to employees during organizing campaign that the only way to prevent plant from closing was to keep customers satisfied did not violate the Act); *United Invest. Corp.,* 249 N.L.R.B. 1058 (1980) (no unfair labor practice where company's general manager made numerous statements that higher labor costs resulting from unionization would cause the company to close due to its inability to absorb costs, since such statements had reasonable basis in fact because company had been operating at cumulative loss). Respondent likewise made a true and lawful statement about Respondent's parent company's freedom to invest its resources. The ALJ engaged in wholesale reinterpretation of the plain language of the script by turning "further investments in this plant would be at risk" into a threat of plant closure.

Spalding testified, and the ALJ found, that he never expressly threatened to close the plant if employees chose to unionize. Tr. 819:17-19. Neither Armstrong, Little, nor Hunsburger testified that they understood Spalding would close the plant if the union came in. Tr. 248:2-13; 222:20 – 223:3, 136. The ALJ's characterization that Spalding gave the speech a second time in order to "reemphasize Respondent's desire to keep the plant non-union" is pure speculative opinion and an impermissible inference contradicted by the stated purpose of the speech: to "talk about more of the reasons that having a union would be bad for you, your families and for this Plant!" GCX 5. Ligon's preference not to invest in union plants does not lead to the conclusion that the speech "implied that the employees' jobs were in jeopardy if they unionized." It is merely the ALJ's opinion that Spalding "warned" the employees that they would have to attend a second meeting if they "did not end the union organizing effort by refusing to support it." As with the interrogation allegation above (and as will be shown for the threat of job loss allegation below), no witness testified that they felt "threatened" by the possibility of further speeches. Therefore, the General Counsel again failed to elicit any testimony that Spalding's speech restrained or coerced any Stahl employees in the exercise of their Section 7 rights. There is simply no evidence that, from the point of view of the employees, Respondent's statements were coercive. Again, Respondent is entitled to prevail on this charge, and the ALJ's finding is due to be reversed.

G. Whether the ALJ Erred in Holding That Respondent Threatened Not to Hire an Employee's Relative Because of the Employee's Protected Activities.

The ALJ unequivocally found that the General Counsel failed to meet its burden of proof on this allegation and recommended that this charge be dismissed. *See* Decision at 27:34-35.[8]

[8] However, despite this unequivocal finding, the ALJ inexplicably nevertheless found that Respondent violated the Act with regard to this allegation Order at p. 31:26-28, and inexplicably adopted and reaffirmed this finding in her Order Ratifying and Adopting Decision of Administrative Law Judge Christine E. Dibble dated April 22, 2016.

H. Whether the ALJ Erred in Holding That Respondent Posted Literature Threatening Permanent Job Loss.

It is well-established that economic strikers can be replaced but not discharged, and unfair labor practice strikers are entitled to immediate restatement upon making an unconditional offer to return. *N.L.R.B. v. Intern'l Van Lines,* 409 U.S. 48, 50-51 (1972). Where an employer differentiates between economic strikes and unfair labor practice strikes, strike replacement remarks can be found lawful. *See, e.g., Liberty Nursing Homes, Inc.,* 236 N.L.R.B. 456, 460 (1978) (refusing to find 8(a)(1) violation where president's statements did not "imply any threats to close the facility or cause any loss of jobs other than through an employer's right to replace economic strikers"). The Board rests its charge on this issue entirely upon the content of one flyer posted at Respondent's plant. *See* CPX 4. While it is true that the flyer does not explicitly lay out strikers' *Laidlaw* rights, when taken in context its language clearly shows that Respondent was referring only to economic strikers. *See, e.g., Laidlaw Corp.,* 171 N.L.R.B. 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

For instance, the flyer at issue makes multiple references to bargaining over economic demands, such as hypothetical requests by the union for "free health insurance, retirement at full pay after 20 years of service, [and] $5 across the board raises for everybody" and states that "the only thing the Union can do [if an agreement is not reached] is call for a strike." CPX 4. The flyer then proceeds to describe the consequences of such an economic strike, such as "the Company has the right to continue operating during a strike and can hire new workers to replace strikers." *Id.* Such language tracks that of *Pirelli Cable,* wherein no 8(a)(1) violation was found where a Q&A document was issued by the employer to the employees reading: "Q. If I go out on strike, can I lose my job? A. Yes. The Company can continue operating the plant, and can hire strike replacements. If you strike in an attempt to force the Company to agree to the Union's

economic demands or to force the Company to withdraw its economic demands, the Company may permanently replace you. When the strike ends you would not have a job if you had been permanently replaced." *Pirelli Cable Corp. v. N.L.R.B.*, 141 F.3d 504 (4th Cir. 1998) (reversing Board's finding that strike in question was an unfair labor strike and finding that the Q&A sheet was "an explanation of bargaining unit workers' *Laidlaw* rights and was not a threat of reprisal for strike activity"). Furthermore, the *Pirelli* court noted "that the Q & A letter, although it did not make an incorrect statement, did not contain a detailed explanation of *Laidlaw* reinstatement rights and did not make the statement that strikers remained employees of Pirelli does not alter our disposition. An explanation of the possible results of labor/management tensions does not become threatening or coercive merely because it is in plain English rather than in legal jargon."

In order to violate the Act, a statement about job loss in the event of an economic strike must not merely be made, but must also *threaten or coerce* employees in the exercise of their Section 7 rights. Neither Charging Party nor Counsel for the General Counsel elicited any testimony from any witness as to whether their Section 7 rights were threatened, or whether they felt coerced, by the language in Respondent's flyer. The IBEW campaign continues. The General Counsel has failed to carry its burden, and Respondent is entitled to prevail on this issue.

IV. CONCLUSION

For the reasons set forth above, the ALJ's decision and recommended order should be rejected in their entirety.

DATED: May 20, 2016

__s/ Chris Mitchell_____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Exceptions to the Decision of the Administrative Law Judge were served on all parties listed pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary and email on this the 19th day of May 2016.

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